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8 MARK MALACHOWSKI,  
9 Plaintiff,  
10 v.  
11 ROMONA A. DOHENY,  
12 Defendant.

Case No. 21-cv-05751-VKD

**ORDER FOR REASSIGNMENT TO A  
DISTRICT JUDGE**

**REPORT & RECOMMENDATION RE  
PLAINTIFF'S RENEWED MOTION  
FOR DEFAULT JUDGMENT**

RE: DKT. NO. 53

14 Plaintiff Mark Malachowski, an attorney, brings this lawsuit against his former client,  
15 defendant Romona Doheny, for failure to pay for legal services he provided. After Ms. Doheny  
16 failed to respond to repeated attempts at service over approximately 18 months, the Clerk entered  
17 a default against her. Dkt No. 48. The Court denied Mr. Malachowski's prior motion for default  
18 judgment without prejudice. Dkt. No. 52. He now files this renewed motion. Dkt. No. 53.

19 Because Ms. Doheny has not appeared in this action and is in default, this Court does not  
20 have the consent of all parties. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; *Williams v. King*, 875 F.3d  
21 500 (9th Cir. 2017). Accordingly, the Court directs the Clerk of the Court to reassign this action  
22 to a district judge, with the following report and recommendation that Mr. Malachowski's motion  
23 for default judgment be granted in part and denied in part.

24 **REPORT AND RECOMMENDATION**

25 **I. BACKGROUND**

26 In April of 2019, Ms. Doheny was named as a defendant in a different lawsuit in this  
27 district, *Gilbert L. Loaec 2014 Trust et al v. Doheny*, Case No. 19-cv-02078-NC ("Loaec case").  
28 See Dkt. No. 16 ¶ 2. She asked Mr. Malachowski to represent her in the matter, and the parties

1 signed a representation agreement. Dkt. No. 16 ¶¶ 2-3; Dkt. No. 53-1, Ex. 1. Mr. Malachowski  
2 represented Ms. Doheny from approximately May 1, 2019 until the case settled in January of  
3 2020. Dkt. No. 16 ¶¶ 2-3, 35.

4 Mr. Malachowski alleges that, as the case proceeded, Ms. Doheny fell behind on her legal  
5 bills. Dkt. No. 16 ¶ 28. He claims that when he confronted her on September 3, 2019 about her  
6 arrears, Ms. Doheny stated that she would pay Mr. Malachowski after she sold her home in  
7 Connecticut. *Id.* ¶¶ 29, 45. As the representation continued, Mr. Malachowski says he continued  
8 to remind Ms. Doheny of her unpaid legal bills, which Ms. Doheny continued to promise to pay.  
9 *Id.* ¶¶ 45-49. A statement of account submitted to the Court shows that Ms. Doheny incurred  
10 \$85,407.50 for services provided by Mr. Malachowski, of which she paid \$54,500, leaving  
11 \$30,907.50 unpaid. Dkt. No. 53-1, Ex. 3.

12 On July 27, 2021, Mr. Malachowski filed this action against Ms. Doheny, asserting claims  
13 for breach of contract, fraud and deceit, account stated, quantum meruit, and “common counts”  
14 under California law. *See* Dkt. No. 1. In his complaint, Mr. Malachowski demanded \$92,722.50  
15 in compensatory and punitive damages, including treble damages, as well as costs of suit. *Id.* at  
16 10.

17 Serving Ms. Doheny with the complaint proved difficult. Although Ms. Doheny lived in  
18 Connecticut at the time the *Loaec* case was filed, Mr. Malachowski believed she had moved to  
19 Florida when he filed this case. *Id.* ¶¶ 2, 8. Shortly before the initial case management conference  
20 in October 2021, Mr. Malachowski informed the Court that his “process servers [had] not been  
21 able to serve Defendant.” Dkt. No. 10 at 1. In November 2021, he reported that process servers  
22 had attempted to serve Ms. Doheny at five different addresses in Florida with no success, and that  
23 he had received information suggesting she had moved back to Connecticut. Dkt. No. 12-1 at 2-3.  
24 In view of these difficulties with service, Mr. Malachowski requested permission to serve Ms.  
25 Doheny by publication. Dkt. No. 12.

26 The Court denied Mr. Malachowski’s request for service by publication, noting that he had  
27 not attempted to serve Ms. Doheny in Connecticut. Dkt. No. 15 at 2. In addition, the Court also  
28 found that Mr. Malachowski had not complied with Cal. C.C.P. § 415.50’s requirement that a

1 complaint served by publication be supported by a sworn statement by the plaintiff. *Id.* at 2-3;  
2 Fed. R. Civ. P. 4(e)(1) (allowing for service to be made “following state law for serving a  
3 summons in an action brought in courts of general jurisdiction in the state where the district court  
4 is located”). In response, Mr. Malachowski filed a first amended complaint (“FAC”) on  
5 December 1, 2021. Dkt. No. 16. The FAC includes a verification but is otherwise identical to the  
6 original complaint, except that it refers to, but does not include, the exhibits attached to the  
7 original complaint. *See id.* at 11.<sup>1</sup>

8 Mr. Malachowski continued his efforts to serve Ms. Doheny. *See* Dkt. Nos. 17, 19, 21. In  
9 March 2022, he again moved to serve Ms. Doheny by publication. Dkt. No. 21. In support of that  
10 motion, Mr. Malachowski reported that process servers had attempted service at several addresses  
11 in Connecticut. Dkt. No. 21-1 at 3-4. At one residential address in Milford, the server attempted  
12 service on six different days. *Id.* During one attempt, the server observed mail addressed to  
13 “Romona Doheny” at the residence. *Id.* at 3. On another day, he was informed by neighbors that  
14 the “Doheny Family” had lived at the property since 2021. *Id.* On one occasion, the server spoke  
15 through the door of the residence with a woman who claimed not to know “Romona Doheny,”  
16 refused to open the door, and told the server to leave. *Id.* at 3. During a later attempt, a woman  
17 who would not answer the door threatened to call the police on the server. *Id.* at 4. These and all  
18 other attempts at personal service on Ms. Doheny in Connecticut were unsuccessful. *Id.* at 3-4.

19 On August 10, 2022, the Court granted Mr. Malachowski’s second motion to serve Ms.  
20 Doheny by publication pursuant to Cal. C.C.P. § 415.50. Dkt. No. 30. It also ordered Mr.  
21 Malachowski to attempt service by mail, pursuant to Cal. C.C.P. § 415.40. *Id.* The Court noted  
22 that “the circumstances described by Mr. Malachowski support a conclusion that Ms. Doheny is  
23 evading service of process.” *Id.* at 2.

24 Mr. Malachowski’s first attempt to serve the FAC by publication was improper. *See* Dkt.  
25 No. 35. In his second attempt, Mr. Malachowski succeeded in having the summons published in

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27 <sup>1</sup> Mr. Malachowski did not seek leave to file the FAC, but he appears to have filed it in an effort to  
28 address the deficiencies noted in the Court’s order denying his request for permission to serve the  
original complaint by publication. Dkt. No. 15 at 2-3.

1 four editions of the Connecticut Post in November and December of 2022. *See* Dkt. No. 43. Mr.  
2 Malachowski says he also sent a copy of the summons to the Milford address by certified mail.  
3 Dkt. No. 38. The Court concluded that “service by publication was completed in accordance with  
4 California Code of Civil Procedure § 415.50 on December 2, 2022.” Dkt. No. 45 at 1. Ms.  
5 Doheny did not respond to the FAC following publication, and the Clerk entered a default against  
6 her on January 30, 2023. Dkt. No. 48.

7 Mr. Malachowski filed his first motion for default judgment against Ms. Doheny on  
8 January 28, 2023. Dkt. No. 46. The Court denied the motion without prejudice. Dkt. No. 52.  
9 The Court directed that any renewed motion for default judgment “must address all of the matters  
10 necessary for a decision on the merits” of the motion, including: (1) subject matter jurisdiction,  
11 (2) personal jurisdiction, (3) why he is entitled to judgment and on which of his five claims, and  
12 (4) why he is entitled to treble damages, attorneys’ fees, and prejudgment interest. *Id.* at 1-3.

13 **II. LEGAL STANDARD**

14 The Clerk must enter default against a party who fails to plead or otherwise defend an  
15 action. Fed. R. Civ. P. 55(a). After entry of default, a court may, in its discretion, enter default  
16 judgment. Fed. R. Civ. P. 55(b)(2);<sup>2</sup> *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In  
17 deciding whether to enter default judgment, a court may consider the following factors: (1) the  
18 possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claim; (3) the  
19 sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a  
20 dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7)  
21 the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.  
22 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In considering these factors, all factual  
23 allegations in the plaintiff’s complaint are taken as true, except those relating to damages.  
24 *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). The court may also hold  
25 a hearing to conduct an accounting, determine the amount of damages, establish the truth of any

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27 <sup>2</sup> “A default judgment may be entered against a minor or incompetent person only if represented  
28 by a general guardian, conservator, or other like fiduciary who has appeared.” Fed. R. Civ. P.  
55(b)(2). There are no such issues presented here. Nor is there any indication that Ms. Doheny is  
a person in military service. *See* 50 U.S.C. § 3931.

1 allegation by evidence, or investigate any other matter. Fed. R. Civ. P. 55(b)(2).

### 2 **III. DISCUSSION**

#### 3 **A. Service of process**

4 A default judgment entered against a defendant who was improperly served is void. *See*  
5 *S.E.C. v. Internet Sols. for Bus. Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007). Rule 4(e)(1) allows for  
6 service to be effectuated by “following state law for serving a summons in an action brought in  
7 courts of general jurisdiction in the state where the district court is located or where service is  
8 made.” Fed. R. Civ. P. 4(e)(1). For the reasons explained in the Court’s prior orders, the Court  
9 finds that Ms. Doheny has been properly served. *See* Dkt. Nos. 30, 35, 45.

#### 10 **B. Jurisdiction**

11 When a default judgment is sought, the court “has an affirmative duty to look into its  
12 jurisdiction over both the subject matter and the parties.” *In re Tuli*, 172 F.3d 707, 712 (9th Cir.  
13 1999) (cleaned up). “The party seeking to invoke the court’s jurisdiction bears the burden of  
14 establishing that jurisdiction exists.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986).

##### 15 **1. Subject matter jurisdiction**

16 The FAC asserts only state law claims and invokes the Court’s diversity jurisdiction under  
17 28 U.S.C. § 1332. Dkt. No. 16 ¶¶ 11, 33-67. A federal court has diversity subject matter  
18 jurisdiction over a case if the suit is between citizens of different states and the amount in  
19 controversy exceeds \$75,000, not including interest and costs. 28 U.S.C. § 1332(a); *Geographic*  
20 *Expeditions, Inc. v. Est. of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106 (9th Cir. 2010). The FAC  
21 alleges that Mr. Malachowski and Ms. Doheny are citizens of different states, California and  
22 Florida, respectively. Dkt. No. 16 ¶¶ 7-8. While it appears from the record that Ms. Doheny may  
23 now reside in Connecticut, there is nothing to suggest that she resides in California. *See* Dkt. No.  
24 30 at 2.

25 It is less clear that the amount in controversy exceeds \$75,000. “The amount in  
26 controversy is determined from the face of the pleadings,” which “means a federal court has  
27 subject matter jurisdiction unless[,] upon the face of the complaint, it is obvious that the suit  
28 cannot involve the necessary amount.” *Geographic Expeditions*, 599 F.3d at 1106 (cleaned up).

1 “The fact that the complaint discloses the existence of a valid defense to the claim does not  
2 eliminate federal jurisdiction.” *Id.* at 1108 (cleaned up). The amount in controversy is not “a  
3 prospective assessment of a defendant’s liability. . . Rather, it is the amount at stake in the  
4 underlying litigation.” *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 417 (9th Cir. 2018)  
5 (cleaned up). In addition to compensatory damages, the amount in controversy includes punitive  
6 damages, and attorneys’ fees that may be awarded by statute or contract. *Fritsch v. Swift*  
7 *Transportation Co. of Arizona, LLC*, 899 F.3d 785, 793 (9th Cir. 2018).

8 When a plaintiff files suit in federal court, the Ninth Circuit uses the “legal certainty” test  
9 to determine whether the complaint meets § 1332(a)’s amount in controversy requirement. *Naffe*  
10 *v. Frey*, 789 F.3d 1030, 1039 (9th Cir. 2015). “Under this test, the sum claimed by the plaintiff  
11 controls if the claim is apparently made in good faith. It must appear to a legal certainty that the  
12 claim is really for less than the jurisdictional amount to justify dismissal.” *Id.* at 1040 (quoting *St.*  
13 *Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938)) (cleaned up). The Ninth  
14 Circuit recognizes three situations where the legal certainty test is met: (1) when the terms of a  
15 contract limit the plaintiff’s possible recovery; (2) when a specific rule of law or measure of  
16 damages limits the amount of damages recoverable; and (3) when independent facts show that the  
17 amount of damages was claimed merely to obtain federal court jurisdiction. *Id.* These narrow  
18 exceptions make it “very difficult to secure a dismissal of a case on the ground that it does not  
19 appear to satisfy the jurisdictional amount requirement.” *Id.*; *Suber v. Chrysler Corp.*, 104 F.3d  
20 578, 583 (3d Cir. 1997) (jurisdictional analysis is a “threshold matter that should involve the court  
21 in only minimal scrutiny of the plaintiff’s claims” and “the court should not consider in its  
22 jurisdictional inquiry the legal sufficiency of those claims or whether the legal theory advanced by  
23 the plaintiffs is probably unsound”).

24 Mr. Malachowski alleges that Ms. Doheny failed to pay \$30,907.50 of the total he invoiced  
25 her for legal services—a sum well below the jurisdictional threshold. *See* Dkt. No. 16 ¶ 66; Dkt.  
26 No. 53 at 15-16. However, the FAC seeks relief in the total amount of \$92,722.50, which Mr.  
27  
28

1 Malachowski says represents treble damages for his claim of fraud and deceit.<sup>3</sup> Dkt. No. 16 at 10;  
2 Dkt. No. 53 at 23; *see also id.* at 15-16. Although the Court concludes below that Mr.  
3 Malachowski is not entitled to an award of damages in this amount, this conclusion is not obvious  
4 from the face of the FAC. Mr. Malachowski's representation agreement with Ms. Doheny does  
5 not limit his possible recovery, no statute or rule of law caps his damages at a particular amount,  
6 and nothing in the record suggests that he claimed an amount of damages above \$75,000 merely to  
7 obtain federal court jurisdiction. Thus, for purposes of the jurisdictional analysis, the Court cannot  
8 conclude to a legal certainty that Mr. Malachowski's asserted claims for relief, including  
9 attorneys' fees, do not satisfy the amount in controversy requirement for diversity jurisdiction.

10 **2. Personal Jurisdiction**

11 Because no federal statute authorizes personal jurisdiction in this matter, California law  
12 applies. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011).  
13 "California's long-arm statute is coextensive with federal due process requirements, so the  
14 jurisdictional analyses under state law and federal due process are the same." *Id.* "For a court to  
15 exercise personal jurisdiction over a nonresident defendant consistent with due process, that  
16 defendant must have certain minimum contacts with the relevant forum such that the maintenance  
17 of the suit does not offend traditional notions of fair play and substantial justice." *Id.* (cleaned up).

18 Mr. Malachowski does not clearly state whether he believes the Court may exercise  
19 general or specific personal jurisdiction over Ms. Doheny, but he appears to rely solely on specific  
20 jurisdiction. Courts in the Ninth Circuit analyze specific jurisdiction under a three-prong test:

21 (1) The non-resident defendant must purposefully direct his  
22 activities or consummate some transaction with the forum or  
23 resident thereof; or perform some act by which he purposefully  
24 avails himself of the privilege of conducting activities in the forum,  
25 thereby invoking the benefits and protections of its laws; (2) the  
claim must be one which arises out of or relates to the defendant's  
forum related activities; and (3) the exercise of jurisdiction must  
comport with fair play and substantial justice, i.e. it must be  
reasonable.

26 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Mr. Malachowski

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28 <sup>3</sup> The FAC also asks for an award of "costs of suit" and "such other and further relief as the Court  
deems just and proper." Dkt. No. 16 at 10.

1 bears the burden of satisfying the first two prongs. *Mavrix Photo*, 647 F.3d at 1228. If he does so,  
 2 then the burden would shift to Ms. Doheny “to set forth a ‘compelling case’ that the exercise of  
 3 jurisdiction would not be reasonable.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S.  
 4 462, 476-78 (1985)).

5 **a. Purposeful availment and purposeful direction**

6 “The first prong of the specific jurisdiction test refers to both purposeful direction and  
 7 purposeful availment.” *Id.* For cases involving contracts, the jurisdictional analysis focuses on  
 8 whether the defendant purposely availed herself of the privilege of conducting activities in the  
 9 forum state. *Schwarzenegger*, 374 F.3d at 802. For cases involving tortious conduct, courts  
 10 employ a purposeful direction analysis, applying an “effects” test. *Mavrix Photo, Inc.*, 647 F.3d at  
 11 1228.<sup>4</sup>

12 Although the FAC asserts both contract and tort claims, Mr. Malachowski relies  
 13 exclusively on the argument that Ms. Doheny purposefully availed herself of the privilege of  
 14 conducting activities in California. *See* Dkt. No. 53 at 4-8. He points to the following facts: Ms.  
 15 Doheny retained him to represent her in the *Loaec* case in this District from May 2019 to January  
 16 2020; she entered into a representation agreement with him for that purpose; the *Loaec* case was  
 17 venued in this District and she was subject to personal jurisdiction here; and she actively  
 18 participated in the defense of that action, including in a mediation.<sup>5</sup> Dkt. No. 53 at 4-5. Mr.  
 19 Malachowski also alleges that he is, and at the time of the representation was, a California attorney  
 20 who resides in this District. Dkt. No. 16 ¶ 7.

21 These activities are sufficient to support a finding that Ms. Doheny purposely availed  
 22 herself of the privilege of conducting activities in California when she retained Mr. Malachowski  
 23 to represent her in the *Loaec* matter, entered into a written agreement with him for that purpose,  
 24

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25 <sup>4</sup> The “effects” test is based on the Supreme Court’s decision in *Calder v. Jones*, 465 U.S. 783  
 26 (1984) and “requires that the defendant allegedly must have (1) committed an intentional act, (2)  
 expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be  
 suffered in the forum state.” *Mavrix Photo, Inc.*, 647 F.3d at 1228 (cleaned up).

27 <sup>5</sup> Mr. Malachowski also alleges that Ms. Doheny visited family in Sunnyvale, California in April  
 28 of 2019, but this visit appears to be unrelated to his representation of her in the *Loaec* case. Dkt.  
 No. 16 ¶ 15.

1 and accepted legal services from Mr. Malachowski in connection with her defense in the action.  
2 *See Burger King*, 471 U.S. at 479 (“prior negotiations and contemplated future consequences,  
3 along with the terms of the contract and the parties’ actual course of dealing” may be considered  
4 in determining whether the defendant established minimum contacts); *see also Vorys, Sater,  
5 Seymour & Pease v. Ryan*, 154 Cal. App. 3d 91, 94-95 (1984) (concluding that “retaining an  
6 attorney in another state gives that state personal jurisdiction in subsequent disputes over  
7 attorneys’ fees”); *cf. Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (applying purposeful  
8 availment analysis where some of plaintiff’s claims regarding legal representation sounded in tort,  
9 but all claims arose out of plaintiff’s contractual relationship with lawyer).

10 Although Mr. Malachowski does not address whether Ms. Doheny purposefully directed  
11 her allegedly tortious conduct to California, the allegations of the FAC are sufficient to support a  
12 finding that she did. For his fraud and deceit claim, Mr. Malachowski alleges that Ms. Doheny  
13 falsely promised that she would pay the amount she owed him for representing her in the *Loaec*  
14 case, and that he relied on those promises in continuing the representation. *See* Dkt. No. 16 ¶¶ 44-  
15 52. The Court may reasonably infer from these allegations that Ms. Doheny knew that her failure  
16 to pay as promised would cause harm to Mr. Malachowski in California. *See Mavrix Photo, Inc.*,  
17 647 F.3d at 1228.

18 **b. Arising out of or relating to**

19 The second prong of the Ninth Circuit’s test, whether the claim arises out of or relates to  
20 the defendant’s forum-related activities, is easily satisfied. *See Schwarzenegger*, 374 F.3d at 802.  
21 All of Mr. Malachowski’s claims concern Ms. Doheny’s alleged failure to pay for services he says  
22 he provided pursuant to the parties’ representation agreement and continued to provide after she  
23 separately promised to pay all past due legal bills. *See* Dkt. No. 16 ¶¶ 34-39, 44-52.

24 **c. Reasonableness**

25 The third prong of the Ninth Circuit’s test, that the exercise of jurisdiction comports with  
26 fair play and substantial justice, is also satisfied. *See Schwarzenegger*, 374 F.3d at 802. It is not  
27 unreasonable for the client of a local attorney retained to defend a case venued here to expect to be  
28 haled into court in California for failure to pay what she owed her attorney. *See, e.g., Daar &*

1 *Newman v. VRL Int'l*, 129 Cal. App. 4th 482, 493 (2005) (“Appellant is a California law firm  
2 which provided valuable legal assistance to respondent. It would be unjust to allow an out-of-state  
3 corporation . . . to authorize retention of the California firm and then avoid paying the firm fees it  
4 claims due for activities undertaken on the corporation’s behalf in California.”). As Ms. Doheny  
5 has not appeared and has not offered any argument (let alone a compelling one) that the exercise  
6 of jurisdiction here would be unreasonable, the Court concludes that the exercise of specific  
7 jurisdiction in this action is fair and just.

8 Because all three prongs of the Ninth Circuit’s specific jurisdiction test are satisfied, the  
9 Court finds that it has specific personal jurisdiction over Ms. Doheny in this matter.

10 **C. *Eitel* Factors**

11 The *Eitel* factors weigh in favor of entering default judgment on Mr. Malachowski’s  
12 breach of contract and account stated claims, but not on his fraud and deceit, quantum meruit, and  
13 “common counts” claims.

14 **1. Possibility of prejudice to Mr. Malachowski**

15 The first *Eitel* factor requires the Court to consider whether Mr. Malachowski would be  
16 prejudiced if default judgment is not entered. The record demonstrates that Ms. Doheny failed to  
17 appear in this matter and failed to defend this action. In addition, the record also suggests that Ms.  
18 Doheny evaded service of process. *See* Dkt. No. 30 at 2. Mr. Malachowski apparently made other  
19 attempts to resolve this dispute. Letters attached as exhibits to Mr. Malachowski’s original  
20 complaint indicate that he offered Ms. Doheny an opportunity to arbitrate any disputed fees. Dkt.  
21 No. 1, Ex. 5; Dkt. No. 16 ¶ 32. In these circumstances, the Court agrees that unless default  
22 judgment is entered, Mr. Malachowski has no other means of recourse.

23 This factor weighs in favor of default judgment. *See, e.g., Ridola v. Chao*, No. 16-cv-  
24 02246-BLF, 2018 WL 2287668, at \*5 (N.D. Cal., May 18, 2018) (finding that the plaintiff would  
25 be prejudiced if default judgment were not entered because she “would have no other means of  
26 recourse against Defendants for the damages caused by their conduct”).

27 **2. Sufficiency of the complaint and likelihood of success on the merits**

28 The second and third *Eitel* factors address the sufficiency of the complaint and the

likelihood that the plaintiff will succeed on the merits of his claims. *Eitel*, 782 F.2d at 1471. These factors require a court to determine whether the plaintiff has pleaded “facts sufficient to establish and succeed upon its claims.” *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1055 (N.D. Cal. 2010). Mr. Malachowski asserts five claims in the FAC, and he seeks default judgment with respect to each claim. Dkt. No. 53 at 9. The Court considers the sufficiency and likely merits of each claim, but treats the fifth claim as duplicative of the third and fourth claims.

**a. Claim 1: breach of contract**

To prevail on a claim for breach of contract under California law, Mr. Malachowski must show that (1) a contract was formed; (2) he did everything required by the contract; (3) Ms. Doheny did not do something required by the contract; and (4) he was harmed as a result. *CSAA Ins. Exch. V. Hodroj*, 72 Cal. App. 5th 272, 276 (2021). Accepting the well-pleaded allegations of the FAC as true, the Court concludes that Mr. Malachowski has established all the elements of his breach of contract claim. As alleged in the FAC: Mr. Malachowski entered into a written representation agreement with Ms. Doheny (Dkt. No. 16 ¶ 34; Dkt. No. 53-1, Ex. 1); he fulfilled his obligations under the agreement by representing Ms. Doheny in the *Loaec* matter (Dkt. No. 16 ¶¶ 34-35); Ms. Doheny failed to pay the fees for legal services rendered by Mr. Malachowski, as reflected in a statement showing an unpaid balance in the amount of \$30,907.50 (Dkt. No. 16 ¶¶ 36-37; Dkt. No. 53-1, Ex. 3); and he has been harmed by Ms. Doheny's nonpayment (Dkt. No. 16 ¶ 39). Accordingly, the second and third *Eitel* factors weigh in favor of default judgment on this claim.

**b. Claim 2: fraud and deceit**

The FAC refers to several species of fraud, including “promissory fraud” and “constructive fraud.” Dkt. No. 16 ¶¶ 30, 41-43. However, as explained in his motion, Mr. Malachowski’s second claim for relief appears to be based a theory of fraudulent representation. *See* Dkt. No. 53 at 12-13. To prevail on such a claim Mr. Malachowski must show (1) a knowingly false representation by Ms. Doheny; (2) an intent to deceive or induce reliance; (3) justifiable reliance by Mr. Malachowski; and (4) resulting damages. *Serv. by Medallion, Inc. v. Clorox Co.*, 44 Cal.

1 App. 4th 1807, 1816, (1996). Any reliance on an allegedly false representation must be  
2 reasonable. *See Soliman v. Philip Morris Inc.*, 311 F.3d 966, 975-76 (9th Cir. 2002). In addition,  
3 there must be a “complete causal relationship between the alleged misrepresentations and the harm  
4 claimed to have resulted therefrom.” *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 1007 (2016)  
5 (cleaned up).

6 A plaintiff must plead fraud with specificity. Fed. R. Civ. P. 9(b) (“In alleging fraud or  
7 mistake, a party must state with particularity the circumstances constituting fraud or mistake.  
8 Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.”).  
9 The FAC alleges that on September 3, 2019 Ms. Doheny told Mr. Malachowski that she did not  
10 have the money to pay her outstanding legal bills, but would pay them after she sold her home in  
11 Connecticut. Dkt. No. 16 ¶¶ 45-48. Apart from the representation that Ms. Doheny allegedly  
12 made to Mr. Malachowski on September 3, 2019, the FAC does not plead any false representation  
13 with specificity. In addition, the FAC’s allegations of knowing falsity and intent to deceive or  
14 induce reliance are entirely conclusory. *Id.* ¶¶ 48-50. *See DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d  
15 847, 854 (9th Cir. 2007) (allegations that “parrot the language” of claim are not well pleaded);  
16 *Triumph Furniture Processing-Exp. Joint Stock Co. v. Everest Furniture Co.*, No. 13-CV-01729  
17 NC, 2013 WL 9600372, at \*3 (N.D. Cal. Aug. 29, 2013) (“conclusory allegations” that defendant  
18 acted “willfully and maliciously” were “insufficient to show the required elements of promissory  
19 fraud”). As for the FAC’s allegations of causation and harm, the Court notes that with respect to  
20 Ms. Doheny’s September 3, 2019 representation, Mr. Malachowski can only have relied on that  
21 representation with respect to services he continued to provide after that date and not for services  
22 provided earlier in the representation before Ms. Doheny made the allegedly false promise.

23 Although Mr. Malachowski’s claim for fraud and deceit is not sufficiently pleaded in some  
24 respects, even if the Court were to assume the sufficiency of the pleading, Mr. Malachowski has  
25 not shown he is likely to succeed on the merits of this claim to the extent he claims Ms. Doheny  
26 deliberately lied when she told him she would pay her outstanding legal bills. The account  
27 statement upon which Mr. Malachowski relies shows that Ms. Doheny paid him a total of \$54,500  
28 between May 2019 and February 2020. Dkt. No. 53-1, Ex. 3. In particular, the statement shows

1 that Ms. Doheny made eight separate payments totaling \$15,500.00 *after* she made the alleged  
 2 false promise on September 3, 2019. *Id.* While Ms. Doheny did not pay everything she owed Mr.  
 3 Malachowski, the record does not clearly support his claim that she intentionally induced him to  
 4 continue his representation of her even though she had no intention of paying him for those  
 5 services. Accordingly, the second and third *Eitel* factors weigh against default judgment on this  
 6 claim.

7 **c. Claims 3-5: account stated and quantum meruit**

8 In California, common counts are “general pleadings which seek[] to recover money owed  
 9 without necessarily specifying the nature of the claim.” *Title Ins. Co. v. State Bd. of Equalization*,  
 10 4 Cal. 4th 715, 731 (1992). The transaction that creates the alleged debt may be either an “express  
 11 contract, a contract implied in fact, or a quasi-contract”—it “makes no difference.” *Util. Audit Co.*  
 12 *v. City of Los Angeles*, 112 Cal. App. 4th 950, 958 (2003). Thus, “common counts” describes a  
 13 type of claim, rather than a claim in itself. *See* 4 Witkin, California Procedure (6th ed. 2023),  
 14 Pleading §§ 567-573. Account stated and quantum meruit are both “common counts.” *Id.* §§ 571,  
 15 572; *see also Fagelbaum & Heller LLP v. Smylie*, 174 Cal. App. 4th 1351, 1355 (2009); *Iverson,*  
 16 *Yoakum, Papiano & Hatch v. Berwald*, 76 Cal. App. 4th 990, 996 (1999). Accordingly, the Court  
 17 considers Mr. Malachowski’s claims for account stated and quantum meruit; it does not separately  
 18 consider his fifth claim of “common counts.”

19 **i. Account stated**

20 “An account stated is an agreement, based on prior transactions between the parties, that all  
 21 items of the account are true and that the balance struck is due and owing from one party to the  
 22 other.” *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1091 (9th Cir. 1989) (quoting *Trafton v.*  
 23 *Youngblood*, 69 Cal. 2d 17, 25 (1968)). The elements of a claim for account stated are “(1)  
 24 previous transactions between the parties establishing the relationship of debtor and creditor; (2)  
 25 an agreement between the parties, express or implied, on the amount due from the debtor to the  
 26 creditor; (3) a promise by the debtor, express or implied, to pay the amount due.” *Martini E Ricci*  
 27 *Iamino S.P.A—Consortile Societa Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp. 3d 954, 976  
 28 (E.D. Cal. 2014) (quoting *Zinn v. Fred R. Bright Co.*, 271 Cal. App. 2d 597, 600 (1969)). “When

1 a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an  
2 agreement that the account is correct as rendered.” *Maggio, Inc. v. Neal*, 196 Cal. App. 3d 745,  
3 753 (1987).

4 California law appears to be unsettled on the question of whether a claim for account stated  
5 can be brought for the breach of a contract which obligates one party to pay a debt, but does not  
6 specify the sum. Several older cases hold that a “debt which is predicated upon the breach of the  
7 terms of an express contract cannot be the basis of an account stated.” *Moore v. Bartholomae*  
8 *Corp.*, 69 Cal. App. 2d 474, 477 (1945); *see also Rio Linda Poultry Farms v. Fredericksen*, 121  
9 Cal. App. 433, 435-36 (1932); *Bennett v. Potter*, 180 Cal. 736, 745 (1919)). However, in  
10 *Professional Collection Consultants v. Lauron*, 8 Cal. App. 5th 958 (2017), a California appellate  
11 court recently remarked that it was “not convinced that [the *Moore*] rule applies in the context of  
12 contracts that do not bind the debtor to pay a specific sum.” 8 Cal. App. 5th at 971 n.5. That court  
13 did not resolve the question, but left it for “another day.” *Id.*

14 Here, the representation agreement itself does not specify a sum that Ms. Doheny must  
15 pay. *See* Dkt. No. 53-1, Ex. 1. In these circumstances, the Court concludes that the FAC  
16 adequately pleads all elements of a claim for account stated, even if there is some question about  
17 whether Mr. Malachowski can proceed on both this claim and his breach of contract claim. On  
18 balance, the second and third *Eitel* factors weigh in favor of default judgment on this claim.

19 **ii. Quantum meruit**

20 “Quantum meruit refers to the well-established principle that the law implies a promise to  
21 pay for services performed under circumstances disclosing that they were not gratuitously  
22 rendered.” *Huskinson & Brown v. Wolf*, 32 Cal. 4th 453, 458 (2004) (cleaned up). The elements  
23 of a claim for quantum meruit are “(1) that the plaintiff performed certain services for the  
24 defendant, (2) their reasonable value, (3) that they were rendered at defendant's request, and (4)  
25 that they are unpaid.” *Cedars Sinai Med. Ctr. v. Mid-W. Nat. Life Ins. Co.*, 118 F. Supp. 2d 1002,  
26 1013 (C.D. Cal. 2000) (citing *Haggerty v. Warner*, 115 Cal. App. 2d 468, 475 (1953)).

27 Under California law, a plaintiff may not “pursue or recover on a [quantum meruit] claim  
28 if the parties have an enforceable agreement regarding a particular subject matter.” *Klein v.*

1        *Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1388 (2012). Because Mr. Malachowski’s quantum  
2        meruit claim encompasses the same subject matter as his breach of contract claim, he cannot  
3        recover on a separate claim for quantum meruit. Accordingly, the second and third *Etel* factors  
4        weigh against default judgment on this claim.

5                    **3.        Sum of money at stake**

6        “The fourth *Etel* factor concerns the relationship between the sum of money at stake and  
7        the seriousness of the defendant’s conduct.” *Fudy Printing Co. v. Aliphcom, Inc.*, No. 17-CV-  
8        03863-JSC, 2019 WL 2180221, at \*4 (N.D. Cal. Mar. 7, 2019). A sum that is “substantial or  
9        unreasonable” weighs against default judgment. *Facebook, Inc. v. Kokhtenko*, No. 21-CV-03036-  
10        YGR (LB), 2021 WL 7448619, at \*7 (N.D. Cal. Dec. 3, 2021). However, a sum that is “tailored  
11        to the specific misconduct” of the defendant supports default judgment. *Bd. of Trustees of the  
12        Sheet Metal Workers Health Care Plan of N. California v. Superhall Mech., Inc.*, No. C-10-2212  
13        EMC, 2011 WL 2600898, at \*2 (N.D. Cal. June 30, 2011).

14        To the extent Mr. Malachowski seeks \$30,907.50 (the amount of Ms. Doheny’s  
15        outstanding balance) on his breach of contract claim, the amount claimed is reasonable. However,  
16        Mr. Malachowski’s demand for treble damages (calculated as three times the amount of Ms.  
17        Doheny’s outstanding balance) is disproportionate to the seriousness of her alleged misconduct,  
18        particularly because Mr. Malachowski is unlikely to succeed on his fraud and deceit claim. In any  
19        event, as discussed below, Mr. Malachowski is not entitled to treble damages.

20        Accordingly, this factor weighs in favor of default judgment on Mr. Malachowski’s claims  
21        for breach of contract claim and account stated, but against default judgment on his fraud and  
22        deceit and quantum meruit claims.

23                    **4.        Possibility of a dispute concerning material facts**

24        The fifth *Etel* factor addresses the possibility of a dispute concerning material facts. *Etel*,  
25        782 F.2d at 1471-72. Where a plaintiff has filed a well-pleaded complaint alleging the elements  
26        necessary to establish its claims, and the Clerk has entered default upon the defendant’s failure to  
27        answer, a court may find the possibility of a dispute as to material facts is unlikely. *Fudy Printing*  
28        2019 WL 2180221, at \*5.

1           As Ms. Doheny has not appeared and has not contested any of the allegations of the FAC,  
2 the Court finds that there is little possibility of a dispute concerning material facts with respect to  
3 any of the asserted claims.<sup>6</sup> Because the FAC does not sufficiently state a claim for fraud and  
4 deceit, and because Mr. Malachowski may not proceed with his quantum meruit claim, this  
5 consideration is not relevant to those claims.

6           Accordingly, this factor weighs in favor of default judgment on Mr. Malachowski's breach  
7 of contract and account stated claims only.

8           **5.       Possibility of excusable neglect**

9           The sixth *Etel* factor concerns whether the default was due to excusable neglect. *Etel*,  
10 782 F.2d at 1471. Where a defendant "blatant[ly] attempts to resist service" or fails to appear after  
11 being properly served, no excusable neglect will be found. *NewGen, LLC v. Safe Cig, LLC*, 840  
12 F.3d 606, 616 (9th Cir. 2016). However, a defendant who "reasonably believe[s]" she is not  
13 required to answer a suit may be excused. *Etel*, 782 F.3d at 1472.

14           As discussed above, the circumstances surrounding Mr. Malachowski's efforts to serve  
15 Ms. Doheny, particularly at the Milford address in Connecticut, suggest that Ms. Doheny  
16 attempted to evade service of process. *See* Dkt. No. 30 at 2. While Ms. Doheny might have a  
17 reasonable excuse for her failure to appear, the Court cannot discern one from the present record.  
18 Accordingly, this factor weighs in favor of default judgment.

19           **6.       Policy favoring decisions on the merits**

20           The seventh *Etel* factor requires consideration of the "strong policy favoring decisions on  
21 the merits" embodied in the federal rules. *Etel*, 782 F.2d at 1472. While the Court prefers to  
22 decide matters on the merits, Ms. Doheny's failure to participate in this litigation makes that  
23 impossible. *See Ridola*, 2018 WL 2287668 at \*13 ("Although federal policy favors decision on  
24 the merits, Rule 55(b)(2) permits entry of default judgment in situations, such as this, where a  
25  
26

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26           <sup>6</sup> The Court notes, however, that typically a fraud claim involves questions of fact involving  
27 determinations of intent and evaluations of credibility that can only be resolved by a jury. *See*  
28 *Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 981 (9th Cir. 1980) ("Fraud claims normally  
are so larded with fact issues (including issues as to intent) that summary judgment is seldom  
possible.").

1 defendant refuses to litigate.”). Default judgment therefore is Mr. Malachowski’s only recourse.  
2 *See United States v. Roof Guard Roofing Co, Inc.*, No. 17-cv-02592-NC, 2017 WL 6994215, at \*3  
3 (N.D. Cal., Dec. 14, 2017) (“When a properly adversarial search for the truth is rendered futile,  
4 default judgment is the appropriate outcome.”).

## 5 **7. Conclusion**

6 Having considered the *Etel* factors, the Court finds that they weigh in favor of default  
7 judgment on Mr. Malachowski’s claims for breach of contract and account stated, and against  
8 default judgment on his claims for fraud and deceit and quantum meruit.

## 9 **D. Requested Relief**

10 Because this Court concludes that default judgment is warranted, it now considers Mr.  
11 Malachowski’s requests for relief. “A default judgment must not differ in kind from, or exceed in  
12 amount, what is demanded in the pleadings.” Fed. R. Civ. P. 54(c). After a default has been  
13 entered, the well-pleaded factual allegations in the complaint are taken as true, except for those  
14 regarding damages. *Craigslist*, 694 F. Supp. 2d at 1051. If the complaint does not contain the  
15 facts necessary to establish damages, they are not established by default. *Philip Morris USA, Inc.*  
16 v. *Castworld Prod., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003).

### 17 **1. Compensatory damages**

18 As discussed above, Mr. Malachowski has adequately pleaded his claims for breach of  
19 contract and account stated. He is entitled to compensatory damages in the amount Ms. Doheny  
20 owes him for his legal services. In his declaration in support of this motion, Mr. Malachowski  
21 claims he is owed \$30,907.50. Dkt. No. 53-1 ¶ 16. That number is supported by the account  
22 statement submitted as an exhibit to that declaration. Dkt. No. 53-1, Ex. 3. This same amount is  
23 alleged in the FAC. Dkt. No. 16 ¶ 65.

### 24 **2. Treble damages**

25 The FAC also includes a demand for treble damages, but does not cite any authority for  
26 that relief. *See* Dkt. No. 16 at 10. In his motion for default judgment, Mr. Malachowski says that  
27 he is entitled to treble damages under California Penal Code § 496(c) as construed by the  
28 California Supreme Court in *Siry Investments, L.P. v. Farkhondehpour*, 13 Cal. 5th 333 (2022).

1 *See* Dkt. No. 53 at 15-16, 23.

2 Mr. Malachowski's demand is baseless. The FAC asserts no claim for relief under Penal  
3 Code § 496(c). Section 496(c) sets forth a right to special civil remedies for violations of Penal  
4 Code § 496(a). Section 496(a) defines the criminal offense of receiving stolen property, which  
5 requires that a plaintiff show "(i) property was stolen or obtained in a manner constituting theft,  
6 (ii) the defendant knew the property was so stolen or obtained, and (iii) the defendant received or  
7 had possession of the stolen property." *Switzer v. Wood*, 35 Cal. App. 5th 116, 126 (2019). In  
8 *Siry Investments*, the California Supreme Court concluded that § 496(c) provides for treble  
9 damages whenever property is obtained in "any manner constituting theft." *Siry Investments*, 13  
10 Cal. 5th at 361. However, these remedies are limited to claims where a plaintiff establishes  
11 "criminal intent on the part of the defendant beyond mere proof of nonperformance or actual  
12 falsity." *Id.* at 361-62 (cleaned up). The FAC pleads neither theft of personal property nor  
13 criminal intent. Accordingly, Mr. Malachowski is not entitled to an award of treble damages.

14 **3. Attorneys' fees**

15 Mr. Malachowski asks for an award of attorneys' fees in the amount of \$9,780 for his work  
16 prosecuting this case. *See* Dkt. No. 53-1, Ex. 7. A request for attorneys' fees must be made by  
17 motion and must be filed no later than 14 days after the entry of judgment. *See* Fed. R. Civ. P.  
18 54(d)(2)(A); (B)(i). It must also "specify the judgment and the statute, rule, or other grounds  
19 entitling the movant to the award." Fed. R. Civ. P. 54(d)(2)(B)(ii).

20 Although the FAC does not include a demand for attorneys' fees, in his motion for default  
21 judgment, Mr. Malachowski cites his representation agreement with Ms. Doheny as the basis for  
22 the requested fees. Dkt. No. 53-1 ¶ 4. The representation agreement provides that the prevailing  
23 party in any action to enforce it is entitled to an award of reasonable attorneys' fees. Dkt. No. 53-  
24 1, Ex. 1 ¶ 10. However, a fee shifting provision like this is unenforceable as a matter of California  
25 law when an attorney litigates in propria persona to enforce a contract to which the attorney is a  
26 party. *See Trope v. Katz*, 11 Cal. 4th 274, 292 (1995); *Soni v. Wellmike Enter. Co.*, 224 Cal. App.  
27 4th 1477, 1481-82 (2014); *see also Farmers Ins. Exch. v. L. Offs. of Conrado Joe Sayas, Jr.*, 250  
28 F.3d 1234, 1236-37 (9th Cir. 2001) (federal court sitting in diversity applies state law regarding

1 attorneys' fees including the *Trope* rule). Because Mr. Malachowski has litigated this case in  
2 propria persona, he is not entitled to recover attorneys' fees on this ground. He cites no other  
3 justification for an award of attorneys' fees.

4 **4. Costs**

5 A bill of costs must be filed within 14 days of entry of judgment and be supported by an  
6 affidavit. Fed. R. Civ. P. 54(d)(1); Civil L. R. 54-1(a); 28 U.S.C. § 1924. Filing fees are allowed  
7 as costs if paid by the claimant and fees for service of process are allowed to the extent reasonably  
8 required and actually incurred. Civil L. R. 54-3(a)(1); (2).

9 In his motion for default judgment, Mr. Malachowski asks for an award of costs in the  
10 amount of \$4,178.31. *See* Dkt. No. 53-1, Ex. 8. This includes \$402 for the filing fee in this case,  
11 \$1,562.75 in fees for his process server, and \$2,213.56 in advertising expenses for the second,  
12 successful, attempt to serve Ms. Doheny by publication. *Id.* As Mr. Malachowski seeks to  
13 recover only his reasonable costs of service, he is entitled to recover the total amount claimed. *See*  
14 Dkt. No. 35 (rejecting Mr. Malachowski's defective attempt to serve Ms. Doheny by publication).

15 **5. Prejudgment interest**

16 Mr. Malachowski also requests prejudgment interest. Dkt. Nos. 53 at 23; 53-1 ¶ 21. In  
17 diversity cases, a party's entitlement to prejudgment interest depends on the law of the applicable  
18 state. *Baker v. Garden Grove Med. Invs., Ltd.*, 306 F. App'x 393, 395 (9th Cir. 2009).

19 California Civil Code § 3287(a) provides that "every person who is entitled to recover  
20 damages certain, or capable of being made certain by calculation, and the right to recover which is  
21 vested in him upon a particular day, is entitled also to recover interest thereon from that day." Cal.  
22 Civ. Code § 3287(a). Damages are certain when the defendant "actually knows the amount owed"  
23 or could have computed that amount from "reasonably available information." *Children's Hosp. &*  
24 *Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 774 (2002). Absent an alternative agreement, the  
25 interest rate is ten percent per annum. Cal. Civ. Code § 3289(b).

26 Mr. Malachowski is entitled to prejudgment interest. His breach of contract and account  
27 stated damages are a sum certain of \$30,907.50 and the FAC alleges that this amount was known  
28 to Ms. Doheny. Dkt. No. 53-1 ¶ 16. In his motion for default judgment, Mr. Malachowski

1 calculates interest using an accrual date of July 27, 2021, the day this lawsuit was filed. *Id.*, Ex. 9.  
2 Accepting this accrual date, the Court concludes that Mr. Malachowski is entitled to interest of ten  
3 percent per annum on the principal amount of \$30,907.50 from July 27, 2021 to the date of  
4 judgment.

5 **IV. CONCLUSION**

6 Because not all parties have consented to a magistrate's jurisdiction, the Court orders that  
7 this case be reassigned to a district judge. For the reasons discussed above, the Court recommends  
8 that Mr. Malachowski's motion for a default judgment be granted as to his breach of contract and  
9 account stated claims and denied as to his remaining claims. The Court further recommends that  
10 judgment be entered in the amount of \$30,907.50, plus prejudgment interest calculated at a rate of  
11 ten percent per annum from July 27, 2021 to the date of judgment, and that Mr. Malachowski be  
12 awarded costs in the amount of \$4,178.31.

13 Mr. Malachowski shall promptly serve Ms. Doheny with a copy of this report and  
14 recommendation by delivering a copy of it to her address in Milford, Connecticut, or to her current  
15 address if known, by personal service or United States mail. Any party may serve and file  
16 objections to this report and recommendation within 14 days after being served. 28 U.S.C.  
17 § 636(b)(1); Fed. R. Civ. P. 72; Civ. L. R. 72-3.

18 **IT IS SO ORDERED.**

19 Dated: July 20, 2023

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22 VIRGINIA K. DEMARCHE  
23 United States Magistrate Judge  
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